

APPEAL NO. 160730
FILED JUNE 17, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on January 12, 2015, and March 24, 2016, in Fort Worth, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (claimant) had disability resulting from a compensable injury sustained on (date of injury), from July 29, 2014, through October 27, 2015, and at no other times through the date of the CCH; (2) the compensable injury does not extend to post-lumbar fusion surgical changes at L4-5, an old fracture at the right L3 transverse process, spondylosis, post-laminectomy syndrome and an L3-4 disc protrusion; (3) the claimant reached maximum medical improvement (MMI) on October 27, 2015; and (4) the claimant's impairment rating (IR) is 10%.

The claimant appealed the hearing officer's determinations regarding extent of injury, MMI and IR as being contrary to the preponderance of the evidence and legally insupportable. The claimant further appealed the hearing officer's determination that the claimant had no disability from October 28, 2015, to the date of the CCH. The respondent/cross-appellant (carrier) responded, urging affirmance of the hearing officer's determinations concerning extent of the compensable injury, MMI, IR, and disability for the period beginning October 28, 2015, to the date of the CCH.

The carrier cross-appealed the hearing officer's determination that the claimant had disability from July 29, 2014, through October 27, 2015, as being contrary to the evidence, arguing that, in his decision, the hearing officer misstated the designated doctor's determination regarding disability as a result of the compensable injury.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the accepted compensable injury is a cervical sprain/strain and lumbar sprain/strain.

The claimant testified that on (date of injury), while moving pallets, he felt a strain in his low back and that the pain worsened to the point that he was unable to continue working after May 19, 2014. The claimant further testified that he had previously undergone lumbar and cervical fusion surgeries and was receiving continuing treatment for those conditions at the time of the compensable injury but that he was able to

perform his regular duties despite his pre-existing condition prior to the compensable injury on (date of injury).

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to post-lumbar fusion surgical changes at L4-5, an old fracture at the right L3 transverse process, spondylosis, post-laminectomy syndrome and an L3-4 disc protrusion is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer's determinations that the claimant reached MMI on October 27, 2015, and that the claimant's IR is 10% are supported by sufficient evidence and are affirmed.

DISABILITY

We note from the evidence and stipulation of the parties that (Dr. D) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to consider the disputed issues of MMI, IR, extent of injury, disability and return to work.

The hearing officer makes clear in his discussion that he based his determination regarding disability, in part, on Dr. D's report. In that portion of the Discussion section of his decision which supports his disability determination, the hearing officer stated:

[Dr. D] opined [the] [c]laimant was only able to return to work at a sedentary or light duty job, and was not able to do the work [the] [c]laimant was doing when he got injured.

However, in his report dated October 27, 2015, Dr. D actually stated:

Return to work: The time frame in question is July 29, 2014, to [the] present time. It is my opinion that [the claimant] **IS** physically capable of returning to work in a non-manual capacity. Due to pre-existing conditions in his neck and low back, I do not believe he should be in a job that requires lifting, carrying, or climbing. I believe he should be able to perform job tasks in a sedentary or light category. . . .

Disability: I have been asked to assess the period from July 29, 2014, to present. In my opinion, the employee's ability to obtain and retain employment at wages equivalent to the pre-injury wage **IS NOT** a direct

result of the compensable injury. His inability is more likely related to his pre-existing conditions.

Although Dr. D opined that the claimant could only return to work in a sedentary or light-duty position, it is clear Dr. D believed the claimant had such restrictions due to his pre-existing condition and not due to the compensable injury.

We accordingly reverse the hearing officer's determination that the claimant had disability resulting from a compensable injury sustained on (date of injury), from July 29, 2014, through October 27, 2015, and at no other times through the date of the CCH and remand the issue of disability resulting from the compensable injury for the hearing officer to consider the evidence, including the designated doctor's report in its entirety, and make findings of fact, conclusions of law, and a decision which are supported by the evidence. We note that the Appeals Panel has previously explained that disability and MMI are different concepts under the 1989 Act, and that while a claimant's entitlement to temporary income benefits ends when he or she reaches MMI, disability as defined by Section 401.011(16) does not necessarily end on that date. See Appeals Panel Decision (APD) 992069, decided October 28, 1999.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to post-lumbar fusion surgical changes at L4-5, an old fracture at the right L3 transverse process, spondylosis, post-laminectomy syndrome and an L3-4 disc protrusion.

We affirm the hearing officer's determination that the claimant reached MMI on October 27, 2015.

We affirm the hearing officer's determination that the claimant's IR is 10%.

We reverse the hearing officer's determination that the claimant had disability resulting from a compensable injury sustained on (date of injury), from July 29, 2014, through October 27, 2015, and at no other times through the date of the CCH and remand the issue of disability resulting from the compensable injury for the hearing officer to consider the evidence, including the designated doctor's report in its entirety, and to make findings of fact, conclusions of law, and a decision which are supported by the evidence.

REMAND INSTRUCTIONS

On remand the hearing officer is to consider all the evidence, including the designated doctor's report in its entirety, and make a determination of whether the

claimant had disability resulting from a compensable injury sustained on (date of injury), from July 29, 2014, through the date of the CCH.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge